

IN THE SUPREME COURT OF MISSOURI

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No. SC86685

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STATE ex rel. THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

and

GATEWAY WESTERN RAILWAY COMPANY,

Relators,

v.

THE HONORABLE MICHAEL P. DAVID,

Respondent.

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ORIGINAL WRIT PROCEEDING  
IN MANDAMUS OR, IN THE ALTERNATIVE, IN PROHIBITION

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RELATORS' REPLY BRIEF

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## ARGUMENT

### *I. Standard Of Review*

Respondent mistakenly assumes that “questions of fact” are involved in resolution of this original writ proceeding. *Respondent’s Brief at 5*. No questions of fact are before the Court in this proceeding because Plaintiff did not file any affidavits or other evidence to counter the affidavits Relators filed in support of their respective motions to transfer venue based on pretensive joinder. *See Plaintiff’s Response and Objection to Defendants’ Motion to Transfer Venue, Ex. 5, pp. 89-90.*<sup>1</sup>

Rule 51.045(b), Mo. R. Civ. P., requires a party opposing a motion to transfer venue to file a reply within thirty days setting forth the basis for venue in the forum. Furthermore, Rule 51.045(b) provides that the court “shall not consider any basis not set forth in the reply.” Since Plaintiff did not attach affidavits or other evidence to his reply, the only evidence that could be considered by Respondent in ruling on Relators’ motions to transfer venue was that submitted by Relators in the affidavits attached to their motions. Thus, there were no contested issues of fact, and where there are no contested issues of fact, there is no need to give any deference to the trial court with respect to the facts. *Verdoorn v. Director of Revenue*, 119 S.W.3d 543, 545 (Mo. 2003).

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<sup>1</sup> All citations to exhibits are to the exhibits attached to Relators’ Petition for a Writ of Mandamus, or, in the alternative, Petition for a Writ of Prohibition.

In any event, Respondent declined to make any findings of fact with respect to the evidence submitted by Relators in support of their motions to transfer venue, ruling that to do so would be tantamount to entering an order for summary judgment for Defendant BNSF, which Respondent declined to do because BNSF had not filed a motion for summary judgment. *Order St. Louis City Cir. Ct. (Apr. 6, 2004), pp. A15.*<sup>2</sup> Likewise, Respondent declined to make any findings with respect to the “law of the case” and res judicata arguments advanced by Relators. *See id. at A11-A16.* Therefore, the issue before this Court “is a legal one as to the effect of the evidence.” *Verdoorn*, 119 S.W.3d at 545.

Respondent argues that compliance with the state’s venue statutes is discretionary. *Respondent’s Brief at 5* (citing *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. Ct. App. W.D. 1998)). Respondent’s reliance on *Jones* is misplaced and his argument is contrary to well-established law. This Court has consistently held that a circuit judge’s obligation to transfer venue under Mo. Rev. Stat. § 476.410 is a ministerial, not a discretionary, duty. *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. 1994)

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<sup>2</sup> All appendix materials are specifically required under Rule 84.04(h)(2), Mo. R. Civ. P. or were filed as exhibits to Relators’ Petition for a Writ of Mandamus, or, in the alternative, Petition for Prohibition pursuant to Rules 94.03 and 97.03, Mo. R. Civ. P., and are included in the appendix for the convenience of the Court.

(discussing statutory history of § 476.410 in detail); *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525, 530 (Mo. 1994).

Respondent's argument that compliance with the state's venue statutes is "discretionary" is based on language in the *Jones* case that "[i]f the statute involves a determination of facts or a combination of facts and law, a discretionary act rather than a ministerial act is involved." *Respondent's Brief at 5* (quoting *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. Ct. App. W.D. 1998)). The court in *Jones* was not discussing Missouri's venue statutes. Furthermore, the quoted language relied on by Respondent is qualified elsewhere in the same opinion as follows: "A ministerial act is defined as an act that law directs the official to perform upon a given set of facts, independent of what the officer may think of the propriety or impropriety of doing the act in a particular case." *Jones*, 965 S.W.2d at 213. A venue ruling clearly involves a ministerial act under this definition. Thus, if the facts of this case demonstrate that venue was improper, an extraordinary writ is proper to force Respondent to transfer venue since it is a ministerial act, not something that is within the discretion of Respondent to decline to do.

All three grounds asserted by Relators in this case for transferring venue present this Court with questions of law. Thus, the appropriate standard of review is not "abuse of discretion," as Respondent contends, but de novo. *State ex rel. Budd Co. v. O'Malley*, 114 S.W.3d 266, 268 (Mo. Ct. App. W.D. 2003) (applying de novo standard of review in original writ proceeding to determine whether Respondent misconstrued or misapplied the law regarding venue).

## ***II. BNSF Was Pretensively Joined To The Lawsuit.***

### ***A. Respondent Was Required To Rule On The Question Of Whether BNSF Was Pretensively Joine As Part Of Its Ruling On Relators' Venue Motion.***

Respondent argues that the trial court was correct in declining to rule on the question of whether BNSF was pretensively joined as a defendant unless and until BNSF files a motion for summary judgment as to the FELA count Plaintiff has alleged against BNSF. *Respondent's Brief at 6-11*. Respondent cites no authority for this proposition, and for good reason – this court has clearly stated that:

Assuming venue was properly vested in the first instance, the subsequent dismissal of the resident defendant does not divest the court in which the action was filed of venue and jurisdiction over the person of the remaining non-resident defendant.

*Bottger v. Cheek*, 815 S.W.2d 76, 79 (Mo. Ct. App. E.D. 1991) (citing *Rakestraw v. Norris*, 478 S.W.2d 409, 414-415 (Mo. Ct. App. 1972) (the fact that plaintiff voluntarily dismissed the only resident defendant before trial did not divest the court of venue if venue was proper before dismissal)). Thus, Relators will be denied their right to have the court decide the issue of whether plaintiff pretensively joined BNSF to the lawsuit for the purpose of creating venue in the City of St. Louis if Respondent defers ruling on the question of venue until after it has dismissed BNSF from the lawsuit in response to a motion for summary judgment.

*B. Respondent Has Not Demonstrated That Plaintiff Had An Objectively Reasonable Belief That He Has An FELA Claim Against BNSF.*

Respondent claims in his Brief that it is “an undisputed fact that the locomotive involved in this case was owned, operated and/or controlled by Defendant BNSF” at the time of Plaintiff’s alleged injury. *Respondent’s Brief at 7*. The fact that Plaintiff made such an allegation in his petition does not make it an “undisputed fact.” Relators have moved beyond the allegations of Plaintiff’s Petition and are relying on the second test of pretensive joinder—which looks to the evidence submitted for and against a motion to transfer venue based on pretensive joinder.

Plaintiff filed no affidavits or other evidence with his Reply. Thus, the only evidence regarding the locomotive is the evidence submitted by Relators, which establishes that BNSF did not possess, operate or control the locomotive at the time of the accident. *See Affidavit of Eric Ege, ¶¶ 8-9, pp. A2-A3; Affidavit of Thomas Martin, ¶¶ 6-14, pp. A5-A9*. Thus, Respondent’s only argument is that BNSF’s mere ownership of the locomotive somehow made Respondent an employee of BNSF. Respondent cites no authority for this proposition other than *Allen v. Larabee Flour Mills Corp.*, 40 S.W.2d 597 (Mo. 1931) ; however, this case provides no support whatsoever for Respondent’s argument that the operator of a locomotive engine is, as a matter of law, an employee of the owner of the locomotive. *Larabee* simply held that the owner of a rail car owes a duty to a consignee’s employees who handle the car to keep the rail car in a safe condition. *Id.* There was no contention in *Larabee* that the consignee’s employee

became an employee of the railroad simply by virtue of handling a rail car that was owned by the railroad.

The only evidence before the court on Relators' motion to transfer venue demonstrates that Plaintiff had no objectively reasonable belief at the time he filed his lawsuit that he was an employee of BNSF. If Respondent had applied the second test for pretensive joinder articulated by this Court, he could have reached no other conclusion than that BNSF was pretensively joined and that venue is improper in the City of St. Louis. *See Doe Run Resources Corp.*, 128 S.W.3d at 504; *Shelton*, 879 S.W.2d at 527; Mo. Rev. Stat. § 508.040. Respondent erred in denying Relators' Motions to Transfer Venue and failed to perform a ministerial act required by law, for which this Court should make its alternative writ of mandamus peremptory, compelling Respondent to transfer venue of the case. *Shelton*, 879 S.W.2d at 530 (citing Mo. Rev. Stat. § 476.410).

***III. Under The “Law Of The Case” Doctrine, Venue Of This Case Had Already Been Decided, Fixing Venue In Saline County, Before Plaintiff Voluntarily Dismissed The Lawsuit And Re-Filed It.***

The order of the Missouri Court of Appeals in this case—before it was dismissed and re-filed—fixed venue in Saline County. *See Order, Mo. Ct. App. E.D., No. ED 82696 (May 6, 2003), Ex. 2E, pp. 31-32.* The fact that Plaintiff dismissed his lawsuit and re-filed it against the same defendants on the same claims, with the only change being the addition of another theory of liability against one of the defendants, did not make the re-

filed lawsuit a different case than the originally-filed lawsuit for purposes of application of the “law of the case” doctrine. *See Bellon Wrecking & Salvage Co. v. David Orf, Inc.*, 983 S.W.2d 541, 546 (Mo. Ct. App. E.D. 1998).

Although Respondent attempts to distinguish the claims made in Plaintiff’s second lawsuit from those made in Plaintiff’s first lawsuit, *see Respondent’s Brief at 11-13*, Respondent cannot deny that every claim Plaintiff asserted in either lawsuit arose out of the same transaction or occurrence and involves the same parties and seeks the same monetary relief. The same “claim” is at issue in this lawsuit as was raised in Plaintiff’s first lawsuit. *See Restatement (Second) of Judgments* § 24 & cmts. (1982) (observing that “[t]he present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories . . . that may be available to the plaintiff”).

***IV. The Judgment Of The Court Of Appeals Fixing Venue In Saline County Has Res Judicata Effect, Precluding Re-Litigation Of That Issue.***

Respondent argues that Plaintiff’s voluntary dismissal of his lawsuit in the circuit court had the magical effect of making the former adjudication of the issue of venue by the court of appeals disappear “as if the writ were never issued.” *Respondent’s Brief at 14*. The cases cited by Respondent do not support this argument.

In *Givens v. Warren*, 905 S.W.2d 130 (Mo. Ct. App. E.D. 1995), *cited in Respondent’s Brief at 14*, the court simply held that once a plaintiff voluntarily dismisses his lawsuit, the trial court “may take no further steps as to the dismissed action.” *Id.* at

132. *Givens* does not stand for the proposition that a ruling by an appellate court is voided if the plaintiff voluntarily dismisses his lawsuit following remand to the trial court.

In *Wittman v. National Supermarkets, Inc.*, 31 S.W.3d 517 (Mo. Ct. App. E.D. 2000), *cited in Respondent's Brief at 14*, the court was confronted with whether the partial litigation of a claim prior to a voluntary dismissal tolled a Michigan corporate survival statute pursuant to a Missouri statute of limitations and a Missouri savings statute. *Id.* at 519-20. The court held that, because the voluntary dismissal rendered the claim a “nullity,” its partial litigation prior to the voluntary dismissal did not toll the Michigan statute. *Id.* at 520. By contrast, in the case at bar, the issue of venue had been fully litigated and conclusively decided by the court of appeals before Plaintiff voluntarily dismissed his lawsuit.

Respondent contends that “direct estoppel” does not apply to this case because “the current disputed matter is not on the same cause of action, as Count IV of plaintiff’s Petition was absent in the first suit.” *Respondent's Brief at 14*. Direct estoppel does apply to this case because Respondent is incorrect in claiming that Plaintiff’s cause of action in the first lawsuit was different from his cause of action in the second lawsuit. *See Restatement (Second) of Judgments* § 24 & cmts. (1982) (observing that “[t]he present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories . . . that may be available to the plaintiff”). However, the outcome is the same whether or not there is identity of the

causes of action asserted in the two lawsuits. “Collateral estoppel” will apply to preclude relitigation of the issue of venue in the second lawsuit if there is no identity of the causes of action asserted in the two lawsuits.

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, *whether on the same or a different claim.*

*Restatement (Second) of Judgments* § 27 (1982) (emphasis added), *cited with approval in Bachman v. Bachman*, 997 S.W.2d 23, 25 (Mo. Ct. App. E.D. 1999). Even if the addition of Count IV makes Plaintiff’s re-filed lawsuit a different claim than what was asserted in the original lawsuit (even though the two suits are asserted against the same parties for the same accident and seek the same relief), relitigation of the issue of venue is still precluded as a matter of “collateral estoppel.”

The issue of venue was litigated in both the circuit court and the court of appeals before Plaintiff voluntarily dismissed his first lawsuit. In the circuit court, Plaintiff missed the deadline for filing his Response to Defendants’ Motions to Transfer Venue, but he did eventually file a response and continued to work up the case. *See Order, Mo. Ct. App. E.D., No. ED 82696 (May 6, 2003), Ex. 2E, p. 32 n.1.* In the court of appeals, Plaintiff filed Suggestions in Opposition to the Writ on behalf of Respondent despite failing to make a return to the Preliminary Order in Prohibition. *See id.* Thus, between Relators’ Petition for Writ and Respondent’s Opposition, the issue of venue was framed

for decision by the court of appeals. When the court of appeals made its writ permanent, it stated that:

Although we resolve this case based on Respondent's default, we reject Respondent's contention in his suggestions in opposition that he had the discretion to deny Relator's motion based on the Plaintiff's reply, which was filed well after the ten days allowed for a reply by Rule 51.045(b).

Once that period expired, Respondent had no discretion to deny the motion and his duty to grant it became purely ministerial. See State ex rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470, 472 (Mo. banc 2002).

*Order, Mo. Ct. App. E.D., No. ED 82696 (May 6, 2003), Ex. 2E, p. 32 n.1.* Thus, the court of appeals did decide the issue of venue under Missouri Rules of Civil Procedure and not on a failure of Respondent to comply with the procedural rules for responding to a preliminary writ.

Relators are aware that *Restatement (Second) of Judgments* § 27 cmt. (e) (1982) states that “[i]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.” The former adjudication of the court of appeals in this case does not fall within the meaning of “default” as used in this passage of *Restatement*. First, as noted above, when the court of appeals ordered venue of the original lawsuit transferred to Saline County, it based its decision on Respondent's failure to perform a ministerial duty to transfer venue of the case under the applicable statutes

and rules of civil procedure. *See Order, Mo. Ct. App. E.D., No. ED 82696 (May 6, 2003), Ex. 2E, p. 32 n.1.*

Second, the *Restatement* itself acknowledges that:

The term “default judgment” has been applied to a range of situations in which judgment was rendered without plenary adjudication of issues on which judgment might rest. At one end of the range, the defaulting party makes no appearance at all in the original action. . . . At the other end of the range of “defaults,” the defaulting party has appeared in the action and offered contest but then, perhaps as late as trial itself, disengaged and suffered judgment to be entered. In this latter kind of situation, the default judgment may have been entered as a sanction for noncompliance with a court order, sometimes signifying not the absence of contest but an embittered dispute over the regularity of the proceedings. Such a judgment is substantially similar to a contested action.

*Restatement (Second) of Judgments* 152 (1982). Reading the *Restatement* in light of these passages, it is clear that the issue of venue was “actually litigated” in this case and that the exception for “default judgments” in § 27, comment (e), is not applicable. Other portions of the *Restatement* likewise support application of issue preclusion in this case. *See, e.g., id.* § 27, cmt. (d) (“When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section.”); *id.* (stating that it is possible for an issue to

have been “actually litigated” when “[a] determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof”); *id.* § 27, cmt. (e) (stating that a “party’s reasons for not litigating in the prior action may be such that preclusion would be appropriate”); *see also* 18A Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction 2d* § 4442 (2002) (“Issue preclusion may arise, however, as a result of a statutory provision or specific substantive concerns. A ‘default’ entered as a procedural sanction also may support issue preclusion in closely related litigation in order to further the purposes of the sanction.”). Furthermore, this Court has previously recognized the res judicata effect of a default judgment. *See Drainage Dist. No. 1 Reformed, of Stoddard County v. Matthews*, 234 S.W.2d 567 (Mo. 1950).

The purpose of the “actually litigated” requirement is to avoid the application of issue preclusion when costly consequences were not reasonably foreseeable at the time of the former adjudication by the party against whom preclusion is sought. *See* 18A Wright et al., *supra* § 4416 (“The risk of precluding relitigation of a mistaken determination is enhanced if the possibility of future preclusion was not foreseen at the time of the first action.”). With that policy concern in mind, the application of issue preclusion to this case, where the same plaintiff is seeking the same relief of money damages from the same defendants based on the same transaction and with the same adversarial posture, is more than fair. *See id.*

The proper method for Plaintiff to attack the court of appeals’ Order was first to request relief from the judgment of the court of appeals itself pursuant to Rule 74.05(d),

Mo. R. Civ. P., *cf. Restatement (Second) of Judgments* § 67 (1982) , or to appeal it pursuant to Rule 83, Mo. R. Civ. P. Plaintiff should not be allowed to avoid the judgment of the court of appeals by voluntarily dismissing and refileing his lawsuit in an attempt to get a “do over.” Defendants would not have been able to avoid the judgment of the court of appeals in such a manner had the issue of venue been ruled against them. The doctrine of mutuality alone dictates that issue preclusion be applied to this case. *Cf. Mastin v. Grimes*, 88 Mo. 478 (Mo. 1885) (in equity, no specific performance without mutuality of remedy).

Because the court of appeals made permanent its Writ of Prohibition ordering venue of the case transferred out of the City of St. Louis to Saline County, *Order, Mo. Ct. App. E.D., No. ED 82696 (May 6, 2003), Ex. 2E, pp. 31-32*, the doctrine of res judicata applies to fix venue of this action in Saline County. As this Court stated in *Drainage Dist. No. 1 Reformed, of Stoddard County*, “[litigant] had full opportunity to litigate those matters in the [previous] case. It cannot be now heard to complain of its own failure to do so. . . . Having failed to there do so the opportunity is no longer available. There must be a sometime end to litigation.” *Drainage Dist. No. 1 Reformed, of Stoddard County*, 234 S.W.2d at 573.

## **CONCLUSION**

For the above-stated reasons, Relators The Kansas City Southern Railway Company and Gateway Western Railway Company respectfully request this Court make its Preliminary Order of Mandamus absolute, directing Respondent, the Honorable Michael P. David, to transfer venue of this cause from the City of St. Louis to Saline County, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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APPENDIX TO RELATORS' REPLY BRIEF

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\* These materials were filed as exhibits with Relators' Petition for a Writ of Mandamus or, in the alternative, Petition for a Writ of Prohibition on March 24, 2005. All documents are from Cause No. 032-01602 in St. Louis City, unless otherwise indicated.

### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing brief contains the information required by Mo. R. Civ. P. 55.03, complies with the limitations in Missouri Supreme Court Rule 84.06(b), and it contains 3,901 words, excluding the parts of the brief exempted; has been prepared in proportionately spaced typeface using Microsoft Word 2003 in 13 pt. Times New Roman font; and includes a virus-free 3.5" floppy disk in Microsoft Word format.

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the foregoing brief with diskette copy, were delivered by hand, this 5th day of August, 2005, to the following:

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